Residence Hotels and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)(W)-1400–08 OF 2014
ABANG ISKANDAR, NALLINI PATHMANATHAN AND ZAMANI A RAHIM JJCA
22 MARCH 2016

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Civil Procedure — Appeal — Appellate interference — Appellate court slow to disturb findings of trial judge — Whether lack of judicial appreciation of evidence rendering decision plainly wrong

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Civil Procedure — Compromise and settlement — Settlement agreement — Dispute between parties compromised through settlement agreement — Whether rendering dispute not actionable

E

Civil Procedure — Res judicata — Issue estoppel — Claim and counterclaim for breach of contract — Claim disposed through summary judgment — Issues pertaining counterclaim conclusively decided during hearing of summary judgment — Whether counterclaim barred by res judicata — Prerequisites for establishing res judicata — Whether operation of res judicata subject to correctness of earlier decision

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The defendant/respondent was the owner of the Seri Pacific Hotel ('the hotel'). By a hotel management agreement dated 27 March 2006 ('the HMA'), the defendant appointed the plaintiff/appellant to manage the hotel for ten years ('the services'). On 30 June 2011, the defendant and the plaintiff agreed to mutually terminate the HMA, compromised all differences and part ways amicably by entering into a mutual separation and settlement agreement dated 30 June 2011 ('MSSA'). Pursuant to the MSSA, the defendant was required to pay RM4.8m to the plaintiff ('the settlement sum'), half of which was to be paid upon execution thereof. The sum of RM2.4m, being the first tranche, was duly paid. The balance of RM2.4m was to be paid on 31 December 2011 ('the balance settlement sum'). On 4 July 2011, the defendant issued a post-dated CIMB Cheque No 274823 dated 31 December 2011 ('the cheque') for the balance settlement sum. However, by letter dated 28 December 2011, the defendant countermanded the cheque alleged breach of the HMA and negligence by the plaintiff ('the breaches'). The plaintiff commenced this action to recover the balance settlement sum owed by the defendant. The defendant contended that the plaintiff was not entitled to the balance

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settlement sum by virtue of the breaches and counterclaimed for a declaration that the plaintiff had breached the HMA and the defendant was entitled to claim for indemnity from the plaintiff pursuant to the HMA and MSSA. The plaintiff's application for summary judgment to obtain the payment of the balance settlement sum was heard on its merits and allowed by Singham J. The High Court allowed the counterclaim. The plaintiff thus brought the present appeal contending that the trial judge erred in allowing the defendant's counterclaim, inter alia, on the following grounds: (a) the defendant's counterclaim was barred by res judicata and/or estoppel by virtue of the summary judgment entered against the defendant; and (b) there was a compromise agreement and/or release and discharge between the defendant and the plaintiff.

Held, allowing the appeal with costs:

(1) An appellate court is generally slow to disturb the findings of the trial judge unless it can be shown that there has been clear lack of judicial appreciation of the evidence such that it would render the decision of the High Court as being plainly wrong (see para 24).

(2) Res judicata is a substantive rule of law. It means a decision on the 'merits' which disposes once and for all of the matters decided and the same becomes the truth between the parties, so that, except on appeal or other exceptional circumstances such as fraud, it cannot be re-litigated between persons bound by the judgment. The doctrine of res judicata has developed over the years to extend to issue estoppel as well, the requirements of which are: (a) that the same question has been decided; (b) that the judicial decision which is said to create the estoppel was final; and (c) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised. It must be shown that the earlier judgment necessarily and with precision determined the point in issues to constitute res judicata (see para 26(a)).

(3) The counterclaim arose and was as a direct consequence/result of the defence pleaded against the plaintiff's claim and therefore, the issues in both were one and the same. The issues in the counterclaim were identical with those that arose in the main claim. As such, the doctrine of estoppel/res judicata ought to be applied in dealing with the counterclaim (see para 26(c)).

(4) In the course of deciding whether or not the plaintiff was entitled to the balance settlement sum via the summary judgment application, Singham J had considered the defendant's counterclaim vis a vis the breaches (which also constituted the counterclaim). Singham J also considered the plaintiff's response to the breaches, namely whether the same had been compromised by the MSSA. His Lordship's decision had

determined the issue that formed the crux of the counterclaim. The findings in Singham J's judgment were not obiter because those findings went to the crux of the dispute and were not made in passing or incidentally (see para 26(e)).

(5) When res judicata is operational, the correctness of the said decision is not a relevant consideration. Even if the decision is not correct in law or fact, res judicata gives effect to the policy that the parties to a judicial decision cannot challenge the correctness of a previous decision, except on appeal. The previous decision, whether a determination of law, fact or mixed fact and law, will also form an issue estoppel. The parties cannot adduce any new evidence or advance any new arguments to contradict the previous decision (see para 26(h)).

(6) Even if res judicata was not applicable, the dispute between the parties that arose out of the HMA (the breaches) had been compromised by the MSSA and therefore, was not actionable. The parties intended and provided for termination of the HMA and a compromise of all matters arising therefrom. Hence, the breaches which constituted the basis for the counterclaim, could not have been a live issue before the trial judge (see para 32).

[Bahasa Malaysia summary

Defendan/responden adalah pemilik Seri Pacific Hotel ('hotel tersebut'). Melalui perjanjian pengurusan hotel bertarikh 27 Mac 2006 ('PPH'), defendan telah melantik plaintif/perayu untuk menguruskan hotel tersebut selama sepuluh tahun ('perkhidmatan tersebut'). Pada 30 Jun 2011, defendan dan plaintif bersetuju untuk bersama menamatkan PPH tersebut, berkompromi semua perbezaan dan menyelesaikan secara baik dengan memasuki perjanjian pengasingan dan penyelesaian bersama bertarikh 30 Jun 2011 ('PPPB'). Menurut PPPB, defendan dikehendaki membayar RM4.8 juta kepada plaintif ('jumlah penyelesaian'), separuh yang telahpun dibayar semasa pelaksanaan tersebut. Jumlah RM2.4 juta, yang tranche pertama, telahpun dibayar. Baki RM2.4 juta telahpun dibayar pada 31 Disember 2011 ('jumlah baki penyelesaian'). Pada 4 Julai 2011, defendan telah mengeluarkan cek tarikh-pasca CIMB No 274823 bertarikh 31 Disember 2011 ('cek tersebut') bagi jumlah baki penyelesaian. Walau bagaimanapun, surat bertarikh 28 Disember 2011, defendan telah mengubah cek yang dikatakan melanggar PPH dan kecuaian oleh plaintif ('pelanggaran tersebut'). Plaintif telah memulakan tindakan ini untuk mendapat semula jumlah baki penyelesaian yang terhutang oleh defendan. Defendan berhujah bahawa plaintif tidak berhak mendapat jumlah baki penyelesaian tersbeut oleh sebab pelanggaran tersebut dan menuntut balas untuk satu deklarasi bahawa plaintif telah melanggar PPH dan defendan berhak menuntut indemniti daripada plaitif menurut PPH dan PPPB tersebut. Permohonan plaintif untuk penghakiman terus bagi memperoleh bayaran tentang jumlah baki penyelesaian telah

didengar atas meritnya dan dibenarkan oleh Singham H. Mahkamah Tinggi telah membenarkan tuntutan balas tersebt. Plaintif oleh itu telah memulakan rayuan ini dengan berhujah bahawa hakim perbicaraan terkhilaf kerana membenarkan tuntutan balas defendan, antara lain, atas alasan-alasan berikut: (a) tuntutan balas defendan telah dihadkan oleh res judicata dan/atau estopel menurut penghakiman terus yang dimasuki terhadap defendan; dan (b) terdapat perjanjian kompromi dan/atau pembebasan dan pelepasan antara defendan dan plaintif.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mahkamah rayuan biasanya tidak begitu cepat untuk mengganggu penemuan hakim perbicaraan kecuali jika ia boleh menunjukkan bahawa jelas terdapat pemahaman kehakiman berhubung keterangan sehingga menjadikan keputusan Mahkamah Tinggi sebagai jelas salah (lihat perenggan 24).

(2) Res judicata adalah rukun undang-undang substantif. Ia bermaksud suatu keputusan tentang 'merit' yang menyelesaikan sekali dan untuk semua perkara yang diputuskan dan yang sama menjadi kebenaran antara pihak-pihak, agar, kecuali atas rayuan atau keadaan luar biasa lain seperti penipuan, ia tidak boleh dilitigasi semula antara orang-orang yang terikat dengan penghakiman tersebut. Doktrin res judicata telah berkembang sejak beberapa tahun untuk meluaskan isu estopel juga, keperluan yang mana adalah: (a) bahawa persoalan sama telah diputuskan; (b) bahawa keputusan kehakiman yang dikatakan untuk menjadikan estopel itu muktamad; dan (c) bahawa pihak-pihak kepada keputusan kehakiman atu privy mereka adalah orang yang sama sebagai pihak-pihak kepada prosiding di mana estopel tersebut ditimbulkan. Ia perlu ditunjukkan bahawa penghakiman awal memerlukan dan dengan tepat menentukan poin dalam isu-isu untuk membentuk res judicata (lihat perenggan 26(a)).

(3) Tuntutan balas yang timbul dan adalah akibat/hasil langsung pembelaan yang dipli terhadap tuntutan plaintif dan oleh itu, isu-isu kedua-duanya adalah satu dan sama. Isu-isu dalam tuntutan balas tersebut adalah sama seperti yang timbul dalam tuntutan utama. Oleh itu, doktrin estopel/res judicata patut terpakai dalam mengendalikan tuntutan balas tersebut (lihat perenggan 26(c)).

(4) Dalam proses memutuskan sama ada atau tidak plaintif berhak kepada jumlah baki penyelesaian tersebut melalui permohonan penghakiman terus, Singham H telah mempertimbangkan tuntutan balas defendan berkaitan pelanggaran (yang juga merupakan tuntutan balas itu). Singham H juga menganggap tindakan plaintif kepada pelanggaran, iaitu sama ada yang sama telah dikompromi oleh PPPB tersebut. Keputusan Yang Arif telah menentukan isu yang membentuk asas

tuntutan balas itu. Penemuan dalam penghakiman Singham H bukan obiter kerana penemuan tersebut adalah asas pertikaian itu dan tidak dibuat sambil lalu atau secara kebetulan (lihat perenggan 26(e)).

(5) Apabila res judicata beroperasi, ketepatan keputusan itu bukan pertimbangan yang relevan. Walaupun keputusan itu tidak betul dari segi undang-undang atau fakta, res judicata memberikan kesan kepada polisi tersebut bahawa pihak-pihak kepada keputusan kehakiman itu tidak boleh mencabar ketepatan keputusan sebelumnya, kecuali atas rayuan. Keputusan sebelumnya, sama ada suatu penentuan undang-undang, fakta atau campuran fakta dan undang-undang, juga akan membentuk satu isu estopel. Pihak-pihak tidak boleh mengemukakan apa-apa keterangan baru atau mengemukakan apa-apa hujah baru yang bercanggah dengan keputusan sebelumnya (lihat perenggan 26(h)).

(6) Jikapun res judicata tidak terpakai, pertikaian antara pihak-pihak yang timbul daripada PPH (pelanggaran tersebut) telah dikompromi oleh PPPB dan oleh itu, tidak boleh diambil tindakan. Pihak-pihak berniat dan memperuntukkan untuk penamatan PPH dan satu kompromi tentang semua perkara yang timbul daripadanya. Justeru, pelanggaran tersebut yang menjadi asas untuk tuntutan balas tersebut, tidak mungkin telah menjadi isu sebenar sebelum hakim perbicaraan tersebut (lihat perenggan 32).]

Notes

For cases on appellate interference, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1017–1018.

For cases on issue estoppel, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7931–7957.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Bank of Credit and Commerce International SA (in liquadition) v Ali [2002] 1 AC 251, HL (refd)

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (folld)

Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2) [1966] 2 All ER 536, HL (refd)

Chemfert Sdn Bhd & Anor v Lim Hua [2010] 5 MLJ 228, CA (refd)

Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1997] 2 MLJ 829, FC (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Hoystead v Taxation Commissioner [1926] AC 155, PC (refd)

Jones v Lewis [1919] 1 KB 328, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389, FC (folld)
Mulkerrins v Pricewaterhouse Coopers [2003] 4 All ER 1, HL (refd)
Safuan Holdings Bhd v Malayan Bank Bhd & Anor [2009] MLJU 398, CA (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494, SC (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1976] 1 MLJ 24, FC (refd)

Legislation referred to

Evidence Act 1950 s 40
Rules of Court 2012 O 14A r 1 , O 33 r 2

Appeal from: Civil Trial No 22NCVC-75–01 of 2012 (High Court, Kuala Lumpur)

Porres Royan (Kumar Partnership) for the appellant.
P Jayasingam (Wong Kian Kheong) for the respondent.

Zamani A Rahim JCA (delivering judgment of the court):

INTRODUCTION

[1] The parties in this appeal will be referred to by their designations in the High Court. The appellant will be referred to as the 'plaintiff' while the respondent will be referred to as the 'defendant'.

[2] This appeal is against the trial judge's judgment dated 21 July 2014 ('the judgment') wherein the High Court allowed the defendant's counterclaim ('the counterclaim') and declared that (i) the plaintiff was in breach of the Hotel Management Agreement dated 27 March 2006 ('the HMA'); and (ii) the defendant is entitled to an indemnity pursuant to the HMA as well as the mutual separation and settlement agreement dated 30 June 2011 ('MSSA'). The defendant was also awarded the sum of RM1,024,565.75 as damages ('the judgment sum').

[3] The plaintiff's claim against the defendant in the main suit was for the sum of RM2.4m. The same was allowed on 14 September 2012 (prior to the trial of the counterclaim) by way of summary judgment ('encl 7') by Singham J (as he then was). The parties were furnished with Singham J's written grounds of judgment in allowing encl 7 ('grounds of judgment for encl 7').

[4] In this appeal, the trial judge had erred when she allowed the counterclaim and refused to be bound by the earlier judgment of Singham J. The trial judge ought to have applied the principle of estoppel/res judicata to the counterclaim as all the issues raised by the defendant in the counterclaim had been comprehensively addressed and determined by Singham J.

BACKGROUND FACTS

[5] The defendant is the owner of the Seri Pacific Hotel located in Kuala Lumpur ('the hotel'). By the HMA, the defendant appointed the plaintiff to manage the hotel for ten years ('the services').

[6] Sometime in September 2007, during the pendency of the HMA, an employment dispute arose between the hotel and one of its employees, Mohd Ansar bin Abdul Rashid ('Ansar'). The said dispute festered until September 2008 when Ansar's services were terminated resulting in Ansar making representations to the Jabatan Perhubungan Perusahaan ('the IR Department') that he had been dismissed without just cause or excuse.

[7] On 28 June 2011, the IR Department notified the plaintiff that Ansar's complaint has been referred to the Industrial Court for adjudication.

[8] Two days later ie on 30 June 2011, the defendant and the plaintiff agreed to mutually terminate the HMA, compromised all differences and part ways amicably by entering into the MSSA.

[9] Pursuant to the MSSA, the defendant was required to pay RM4.8m to the plaintiff ('the settlement sum'), half of which was to be paid upon execution thereof. The sum of RM2.4m, being the first tranche, was duly paid.

[10] The balance of RM2.4m was to be paid on 31 December 2011 ('the balance settlement sum'). On 4 July 2011, the defendant issued a post-dated CIMB Cheque No 274823 dated 31 December 2011 ('the cheque') for the balance settlement sum.

[11] On 1 November 2011, Ansar filed his statement of case with the Industrial Court and the same was registered as Industrial Court Case No 13/4–824 of 2011 ('the IR case').

[12] By letter dated 28 December 2011, the defendant countermanded the cheque alleged for breach of the HMA and negligence by the plaintiff ('the breaches'). Specifically, the areas complained of included the following:

(a) the plaintiff was in breach of cl 3.4.1 of the HMA as it terminated Ansar's

employment without cause or excuse resulting in the commencement of the IR case;

(b) the plaintiff was in breach of cl 3.4.7 of the HMA by failing to obtain a prior authorisation of the defendant's board of directors before extending Ansar's employment contract; and

(c) the plaintiff was negligent in carrying out its duty by failing to include a term that Ansar was to be reinstated to his position subject to his retirement age being 62 years in a memorandum of settlement dated 9 September 2008 executed at the IR Department.

[13] Dissatisfied, the plaintiff commenced the action herein to recover the balance settlement sum owed by the defendant. In its defence, the defendant contended that the plaintiff was not entitled to the balance settlement sum by virtue of the breaches and filed the counterclaim seeking, inter alia, the following relief:

(a) a declaration that the plaintiff had breached the HMA and the defendant is entitled to claim for indemnity from the plaintiff pursuant to cll 14.1 and 14.2 of the HMA as well as cl 9.4 of the MSSA;

(b) an order that the plaintiff pays the defendant:

(i) (1) a sum of RM965,173 which is the settlement sum in the IR Department proceedings; and
(2) all costs, expenses and legal fees which had to be paid by the defendant in the IR Department proceedings.
('the indemnity sum')

(ii) a sum of RM20,584 which is Ansar's back wages;

(iii) interest; and

(iv) costs.

SUMMARY PROCEEDINGS BEFORE THE HIGH COURT

[14] Subsequent to commencement of the action, the plaintiff applied for summary judgment via encl 7 to obtain the payment of the balance settlement sum.

[15] Enclosure 7 was heard on its merits by Singham J. On 14 September 2012, encl 7 was allowed by His Lordship who also furnished the parties with his written grounds of judgment.

[16] The defendant subsequently filed an application for an extension of time to file its notice of appeal against the decision of the High Court dated 14

September 2012 in respect of the summary judgment of encl 7. However, on 11 January 2013, the Court of Appeal dismissed the defendant's application.

[17] The plaintiff on 25 October 2012 filed an application to summarily dispose the case on points of law pursuant to O 14A r 1 and/or O 33 r 2 of the Rules of Court 2012 ('O 14A application') whereby the plaintiff had amongst others, invited the High Court to dismiss the counterclaim based on the ground/issue of res judicata and/or estoppel.

[18] The defendant then filed an application to recuse Singham J from proceeding to hear and decide the plaintiff's application to summarily dispose the matter on points of law as well as the defendant's counterclaim amongst others, on the grounds that Singham J had made certain findings in the summary judgment application which 'impingned the merits of the counterclaim' ('application to recuse').

[19] On 20 February 2013, Singham J dismissed the application to recuse.

[20] The High Court also subsequently dismissed the plaintiff's O 14A application on the premise, inter alia, that the issue of estoppel was an issue that ought to be tried. The plaintiff did not file an appeal against the dismissal of the O 14A application.

[21] Subsequently to the decision of encl 7, the plaintiff amended its defence to the counterclaim by pleading that the defendant is estopped from pursuing the counterclaim.

[22] The trial of the counterclaim proceeded on 25 June 2014. The defendant called two witnesses, namely Ansar who was DW1 and the general manager of the hotel, Mr Mohamad Halim bin Merican ('DW2'). The plaintiff called one witness, its chief executive officer namely, Puan Nyak Rohana bt Nyak Ariff ('PW1'). After hearing the evidence and submissions, the High Court allowed the counterclaim.

THE FINDINGS OF THE HIGH COURT

[23] In allowing the counterclaim, the trial judge held, inter alia, as follows:

> (a) I am mindful of the fact that the learned judge (ie Singham J) had made certain findings of fact (in the summary judgment application) ... I concur with the defendant that such findings are merely obiter dicta because the issue before the learned judge in enclosure 7 was whether the plaintiff was entitled to be paid the Balance Sum, based on the MSSA ... ;

(b) More importantly, the learned judge did not dismiss or make any orders concerning the defendant's counterclaim;

(c) With the greatest of respect to the learned judge, I find that I cannot agree with him in his findings ... The learned judge did not have the benefit of appreciating the oral testimony of the witness and documentary evidence pertinent to the counterclaim;

(d) With respect I do not agree with the submission advanced by learned counsel for the plaintiff that s 40 of the Evidence Act applies to bar the defendant from pursuing its counter claim. This is because the counter claim is a separate cause of action from the plaintiff's main suit;

(e) It is my finding that the plaintiff owed the defendant a contractual duty of care pursuant to sub clause 3.4.1 and 3.4.7 of the HMA ... ;

(f) Similarly, I find there is also cogent evidence of the plaintiff's breach of common law duty of care owed to the defendant in that despite of it being directed to obtain a legal opinion by the defendant's BOD on 24.7.2008 it had failed to do so;

(g) I further find that the defendant has proved its losses as a result of these breaches ... ; and

(h) In light of the foregoing, the defendant's counterclaim was allowed as prayed for.

[24] The principles of law on appellate intervention are settled. An appellate court is generally slow to disturb the findings of the trial judge unless it can be shown that there has been clear lack of judicial appreciation of the evidence such that it would render the decision of the High Court as being plainly wrong.

See *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97.

[25] Learned counsel for the plaintiff submitted that the trial judge erred in allowing the defendant's counterclaim on the following grounds:

(a) whether the defendant's counterclaim for the indemnity against the plaintiff is barred by res judicata and/or estoppel by virtue of the summary judgment entered against the defendant in the main suit on 14 September 2012 and/or the MSSA?

(b) whether the plaintiff had breached its contractual and common law duty of care against the defendant? Or whether there was a compromise agreement and/or release and discharge between the defendant and the plaintiff; and

(c) if so, whether the defendant is entitled to claim indemnity from the plaintiff for losses suffered by the defendant based on the HMA and/or the MSSA?

Whether res judicata/estoppel applicable

[26] The trial judge fell into error when Her Ladyship concluded that estoppel/res judicata did not apply and that Singham J's decision in encl 7 is obiter on the basis that the counterclaim is a separate action with different issues as compared to the main claim. On the facts and circumstances of this case, it is our view that:

(a) res judicata is a substantive rule of law. It means a decision on the 'merits' which disposes once and for all of the matters decided and the same becomes the truth between the parties, so that, except on appeal or other exceptional circumstances such as fraud, it cannot be re-litigated between persons bound by the judgment. The doctrine of res judicata has developed over the years to extend to issue estoppel as well, the requirements of which are (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised. We are also mindful of the fact that it must be shown that the earlier judgment necessarily and with precision determined the point in issues to constitute res judicata;

See (i) *Hoystead v Taxation Commissioner* [1926] AC 155;

(ii) *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1966] 2 All ER 536 at p 565;

(iii) *Tong Lee Hwa & Anor v Lee Yoke San* [1976] 1 MLJ 24 (FC); and

(iv) *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC).

(b) the parties cannot raise a second time in the same suit issues that have already been determined earlier expressly or by necessary implication. Additionally, where res judicata is not strictly established or where estoppel res judicatum is not made out but nevertheless, the circumstances are such as to render any re-agitation of the questions formerly adjudicated upon, a scandal and an abuse, the court would not hesitate to dismiss the action;

See (i) *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 (SC); and

(ii) *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 (CA).

(c) the trial judge ought to have appreciated that the counterclaim arose and was as a direct consequence/result of the defence pleaded against the plaintiff's claim and therefore, the issues in both are one and the same. This is because:

(i) in defending the plaintiff's claim, the defendant pleaded that by reason of the breaches, the plaintiff was not entitled to the balance settlement sum;

(ii) then, in the counterclaim, the defendant relied on all its averments in the defence, ie the breaches;

(iii) the defendant further pleaded in the counterclaim that by virtue of the breaches, it is entitled to the judgment sum as damages;

(iv) in its defence to the counterclaim, the plaintiff alleged that all matters and disputes surrounding the HMA (the breaches) have been compromised and ceased to exist as the parties had executed the MSSA;

(v) what becomes plain is that the breaches and the plaintiff's defence of compromise formed the cornerstone and the crux of both the defence as well as the counterclaim. This, the learned trial judge failed to appreciate;

(vi) as such, any finding of fact in respect of the defence to the main claim will have a direct bearing on the counterclaim. In other words, all findings of fact vis a vis the breaches and the plaintiff's defence of compromise will have a direct bearing on the counterclaim;

(d) the issues in the counterclaim are identical with those that arose in the main claim. As such, the doctrine of estoppel/res judicata ought to be applied in dealing with the counterclaim;

(e) we now turn to encl 7. In the course of deciding whether or not the plaintiff was entitled to the balance settlement sum via encl 7, it is evident that Singham J considered the defendant's counterclaim vis a vis the breaches (which also constituted the counterclaim). Singham J also considered the plaintiff's response to the breaches, namely whether the same had been compromised by the MSSA. Indisputably, His Lordship's decision in respect of encl 7 necessarily and with precision determined the issue that formed the crux of the counterclaim. To illustrate the point, the issues and the findings of Singham J in his grounds of judgment for encl 7 are set out in the table hereunder:

Issues in the counterclaim	Findings by Singham J in encl 7
Whether the plaintiff was in breach of cll 3.4.1 & 3.4.7 of the HMA as well as its common law duty of care vis a vis the employment dispute with Ansar?	The letter dated 28 June 2011 from the IR Department was issued prior to the execution of the MSSA on 30 June 2011, wherein the defendant and Ansar were notified that Ansar's representations had been referred to the Industrial Court (Para 18 of grounds of judgment for encl 7).
(the breaches)	The court agreed that the facts relating to the alleged breaches of cll 3.4.1 & 3.4.7 of the HMA existed prior to the execution of the MSSA and the defendant elected to compromise the same by executing the MSSA (Para 19 b of grounds of judgment for encl 7).
Whether Ansar's dispute was compromised by the parties by entering into the MSSA?	... parties have indeed taken into consideration all the alleged counterclaim when the MSSA was freely executed by the plaintiff and the defendant (Para 18 of grounds of judgment for encl 7).
	The court agreed that by executing the MSSA, the defendant consciously elected to compromise its differences/disputes in respect of the HMA with the plaintiff (Para 19 d of grounds of judgment for encl 7).
	All matters relating to Ansar were compromised between the parties upon execution of the MSSA (Para 21 of grounds of judgment for encl 7).
Whether HMA still exists given that parties have executed the MSSA?	The HMA has no legal and enforceable effect as the HMA had been effectively terminated at the time of execution of the MSSA. Therefore, any reference to the clauses or terms in the HMA is of no legal effect and unenforceable. (Para 16 of grounds of judgment for encl 7).

Whether defendant was aware of Ansar's claim at the time of entering into the MSSA?	The court agreed that at all material times prior to the execution of the MSSA, the defendant had actual knowledge and/or reasonable means of knowing the alleged breaches (Para 19 c of grounds of judgment for encl 7).
	It is important to reiterate that the claim or representation made by Ansar against the defendant on his dismissal was a live issue at all times material to the execution of the MSSA on 30 June 2011 and there was no surprise to the defendant (Para 20 of grounds of judgment for encl 7).

(f) the table above clearly establishes that there are findings of fact (which have become the truth between the parties) in relation to all issues raised in the counterclaim. The findings in Singham J's judgment are not obiter because those findings went to the crux of the dispute and were not made in passing or incidentally. The term obiter has been defined as 'a mere chance remark by the court and is used in contradistinction to ratio decidendi — the rule of law for which a case is authority'. Clearly, the findings in encl 7 were ratio as opposed to obiter,

See *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1997] 2 MLJ 829 (FC) at p 836.

(g) quite apart from the above, the trial judge fell into further error when she decided to depart from the findings of Singham J on the basis that His Lordship did not have the benefit of appreciating oral testimony of the witnesses and documentary evidence pertinent to the counterclaim;

(h) the learned trial judge's views were patently wrong because when res judicata is operational, the correctness of the said decision is not a relevant consideration. Even if the decision is not correct in law or fact, res judicata gives effect to the policy that the parties to a judicial decision cannot challenge the correctness of a previous decision, except on appeal. The previous decision, whether a determination of law, fact or mixed fact and law, will also form an issue estoppel;

See (i) *Mulkerrins v Pricewaterhouse Coopers* [2003] 4 All ER 1;

(ii) Paragraph 1.03 at p 2 — *Spencer, Bower & Handley on Res Judicata* (4th Ed); and

(iii) *Jones v Lewis* [1919] 1 KB 328 (CA) at p 345.

(i) the parties also cannot adduce any new evidence or advance any new

arguments to contradict the previous decision. In *Asia Commercial Finance (M) Bhd*, the Supreme Court held that:

> However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, *ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties*. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; *the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision*. (Emphasis added.)

See *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC).

(j) the trial judge ought to have disregarded all evidence by the defendant at trial because in the absence of any appeal in respect of the decision in encl 7, the decision of Singham J remained 'the truth' between the parties. The correctness of it is wholly immaterial and the defendant is not entitled to challenge the same via the counterclaim. The rule is very simply that until and unless that finding has been appealed against, the findings of the court via a judgment is the truth and remains the truth. The rule does not distinguish between findings made based on affidavit evidence and findings made based on oral evidence;

(k) this is fortified by s 40 of the Evidence Act, which recognises that a previous judgment is relevant in barring a second suit. Section 40 of the Evidence Act 1950 is as follows:

> 40 Previous judgments relevant to bar a second suit or trial
>
> The existence of any judgment, order or decree which by law prevents any court from taking cognisance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognisance of the suit or to hold the trial

See *Chemfert Sdn Bhd & Anor v Lim Hua* [2010] 5 MLJ 228 (CA).

(l) by reason of the trial judge's findings, there are now two diametrically opposite findings of fact vis a vis the same matter. On the one hand, Singham J held that the plaintiff was not in breach of cl 3.4.1 and cl 3.4.7 of the HMA whilst to the contrary, the trial judge has held otherwise ie the plaintiff is in breach of cl 3.4.1 and cl 3.4.7 of the Act.

Whether plaintiff breached its contractual and common law duty of care or whether the plaintiff and the defendant intended a compromise

[27] The defendant took the opposite stand. The defendant submitted that the issue of res judicata and/or estoppel did not apply in this instance because:

(a) the defendant did not any time, expressly waive its right to pursue the indemnity under the counterclaim in making payment of the balance sum to the plaintiff's solicitors;

(b) the defendant did not make any representation or take any step and/or action which could lead the plaintiff to believe that the defendant had abandoned its claim under the counterclaim;

(c) the plaintiff did not adduce any evidence at trial to prove that the defendant had induced the plaintiff to act in a manner as if the defendant would not pursue its counterclaim; and

(d) in fact, the defendant had applied in court to recuse Singham J from hearing the counterclaim because Singham J, with the greatest respect, had made certain findings in His Lordship's grounds of summary judgment that had 'impinged on the merits of the counterclaim'. If the defendant had intended to abandon its claim in the counterclaim, the defendant would not have filed the application for recusal.

[28] The plaintiff had breached its contractual duty of care to the defendant. The defendant relied on cll 3.4.1 and 3.4.7 of the HMA agreement. The defendant further submitted that the plaintiff also owed a common law duty of care to the defendant for two main reasons. Firstly, there existed a close proximity of relationship between the plaintiff and the defendant. Secondly, it was also reasonably foreseeable that the plaintiff owed the defendant a duty of care.

[29] In addition, the defendant has satisfied the 'three-stage' test as enunciated by the English House of Lords case in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 which was subsequently adopted and followed by our Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 at p 405.

[30] The plaintiff was also alleged to have been guilty of committing breaches. Firstly, the plaintiff had extended Ansar's retirement age without the approval of the defendant's board of directors. Secondly, the plaintiff failed to obtain a legal opinion from its lawyers despite being expressly directed to do so. Thirdly, Ansar was unlawfully dismissed from his employment with the hotel.

[31] As a direct consequence of the breaches, the defendant was said to suffer losses as follows:

(a) the defendant had to pay Ansar's back wages;

(b) on the legal opinion of Messrs Shearn Delamore & Co, an advocate and solicitor, the defendant paid the settlement sum to Ansar;

(c) the defendant had to bear the costs and expenses in relation to IR Department proceedings amounting to RM38,808.75.

[32] Be that as it may, the trial judge ought to have recognised that even if res judicata was not applicable, the dispute between the parties that arose out of the HMA (the breaches) had been compromised by the MSSA and therefore, is not actionable for reasons as follows:

(a) even assuming that the trial judge was entitled to construe afresh the HMA and MSSA independently of the decision of Singham J in encl 7 (which the trial judge was not entitled to), she failed to appreciate the trite principle of construction that a document must be construed by taking into account all the background facts and the intention of parties;

(b) it is plain that parties intended to compromise all matters, including disputes as well as the IR case when they negotiated and executed the MSSA. To this end, Preamble 'E' of the MSSA is noteworthy:

> E. *The Parties have agreed to release and discharge each other from further performance and terminate the Hotel Management Agreement* effective from 30 June 2011 (Final Date), subject to and upon the terms and conditions as herein contained. *It is hereby acknowledged that the decision to terminate the Hotel Management Agreement* in accordance with the terms herein is based on amicable terms, *made in the spirit of mutual trust and respect, and not due to reasons of performance*. (Emphasis added.)

(c) Preamble 'E' taken together with the background facts make it clear that parties entered into the MSSA to wipe the slate clean and to part ways amicably. The release by one party of another from liability arising from whatever state of affairs ('the HMA') is, of course, the very essence of a compromise. A compromise is inevitably entered into to ensure closure. In the present case, it would necessarily include the breaches and the IR case;

(d) it is clear that when the MSSA was executed, parties no longer wished to be bound to the HMA. What they intended to provide for was the termination of the HMA and the regulation of their relationship thereafter through the MSSA. This is borne out by cll 2.1, 2.5 and cl 15 of the MSSA which repeatedly make reference to the termination of the HMA. For ease of reference, these clauses are set out hereafter:

> 2.1 In consideration of the promises and the terms hereinafter set out, SPC (ie the defendant) and RHR (the plaintiff) hereby mutually agree to terminate the Hotel Management Agreement in accordance with the terms and conditions contained herein and agree to release and discharge each other from their respective obligations, rights and liabilities under the Hotel

A Management Agreement and neither Party shall henceforth have any claims whatsoever against the other in respect of the same except as may be provided herein.

2.5 The parties further agree that the Hotel Management Agreement shall upon execution of this Agreement be duly terminated.

B

15 This Agreement (together with any documents referred to herein) constitutes the whole agreement between the Parties hereto with respect to the subject matter hereof and supersedes all prior understandings, undertakings, representations of agreements (written oral) between the Parties. It is further expressly declared that no variation hereof shall be effective unless made in writing.

C

(e) the foregoing makes it patently clear that parties intended and provided for termination of the HMA and a compromise of all matters arising therefrom;

D

(f) accepting that premise, the breaches which constitute the basis for the counterclaim, could not have been a live issue before the trial judge;

See (i) *Safuan Holdings Bhd v Malayan Bank Bhd & Anor* [2009] MLJU 398 (CA);
(ii) David Foskett, *'The Law and Practice of Compromise'* (4th Ed), pp 90–92.

E

(g) the defendant contended that the IR case could not have been compromised by the MSSA because it had no knowledge of the same. Whether the defendant has knowledge of the details or otherwise is irrelevant because the language of the MSSA suggests that all matters have been compromised. When it comes to a compromise 65 agreement and/or release, *it is open to parties to agree to release and discharge each other even from claims which could not on the facts be known to the parties*;

F

G

See *Bank of Credit and Commerce International SA (in liquadition) v Ali* [2002] 1 AC 251 at p 259.

(h) however, the evidence at trial established that the defendant did have knowledge of the dispute and the IR case and that it entered into the MSSA with its 'eyes wide open', all of which, the trial judge failed to appreciate and/or consider. That evidence consists of the following:

H

(i) the defendant's knowledge of the IR case at the material time is corroborated by cl 2.3(f) of the MSSA:

I

2.3 SPC (ie the defendant) shall make payment to RHR (ie the plaintiff) of the Settlement Sum by way of bank draft and in the following manner:

(f) The sum of Ringgit Malaysia Nineteen Thousand One

> Hundred and Sixty Seven and Sen Ninety Eight (RM19,167.98) being sums paid by RHR (ie the plaintiff) for legal fees on behalf of SPC (ie the defendant), *incurred in legal proceedings instituted by Mohamed Ansar Abdul Rashid (Ansar's Case)*, as supported by the invoices set out in Appendix II ...

(ii) DW2 confirmed that the board of directors of the defendant was well aware of the dispute with Ansar before the execution of the MSSA;

(iii) PW1 informed the board of directors of the defendant on 9 April 2009 that she would be compiling and submitting all the relevant documents to the IR Department for it to determine whether Ansar's complaint should be referred to the Industrial Court. This establishes that as far back as 2009, the defendant was aware that Ansar's grievances may result in litigation;

(iv) the defendant was notified by the IR Department by letter dated 28 June 2011 that Ansar's complaint had been referred to the Industrial Court. It was never challenged at trial;

(v) PW1 also confirmed that the defendant was always updated and kept informed of matters pertaining to the dispute with Ansar. That part of her evidence was also never challenged; and

(vi) armed with the knowledge of the dispute with Ansar, its potential financial exposure and the notification by the IR Department, it is reasonable to infer that the defendant well knew what awaited them in the Industrial Court. Notwithstanding, they elected to execute the MSSA without reserving their rights thereto, despite having solicitors to advise them.

[33] To recap, the principle of res judicata is applicable to the facts in the present case. The rule of estoppel has, therefore, arisen which barred the defendant from raising all issues afresh. All matters and disputes are settled by the parties' clear intention and through a compromise by the execution of the MSSA.

CONCLUSION

[34] Having considered the relevant principles of law and having applied them to the facts (especially the relevant documents) in this case, we were of the unanimous view that the plaintiff's appeal ought to be and was hereby allowed with costs of RM50,000 for the court below and RM15,000 for succeeding in this appeal. The decision of the High Court judge was set aside. The monies, if paid by the plaintiff to the defendant, were ordered to be refunded with interest

at 5%pa from the date of payment until full payment. We also would order that the deposit to be refunded to the plaintiff (appellant).

Appeal allowed with costs.

Reported by Kanesh Sundrum